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SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

October Term, 1953

No. 7

Brewer, et al., *Appellants*,

v.

Lemon, State Board of Missions, Dickerson, et al.,
Appellees.

Appeal From The Three-Judge United States District Court,
Eastern District Of Louisiana, New Orleans Division

BRIEF FOR THE APPELLANTS

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INDEX

	Page
Opinion Below	1
Jurisdiction	2
Constitution and Statutes Involved	2
Question Presented	2
Statement Of The Case	3
Argument	5
Conclusion	14
Appendix	
Civil Rights Act, Rev. Stat. 1979, 42 U. S. Code, §§ 1981, 1983	a1
28 U.S.C. § 1343	a2

Authorities Cited

Cases:

Ableman v. *Booth*, 62 U.S. (21 How.) 506, 514-523 (1859)	13
Baker v. *Carr*, 369 U. S. 186, 200-204 (1962)	12
Chas. Wolff Packing Co. v. *Court of Ind. Relations*, 267 U. S. 552, 582 (1925)	10
Cohens v. *Virginia*, 19 U. S. (6 Wheat) 264 (1821)	11
Crown Kosher Super Market of Mass., Inc. v. *Gallagher*, 176 F. Supp. 466, 471 (D. Mass. 1959)	13
Dorchy v. *Kansas*, 264 U. S. 286, 290 (1924)	10
England v. *Louisiana State Board of Medical Examiners*, 259 F. 2d 626 (5th Cir. 1958), *reh. den.* 263 F. 2d 661, 674 (5th Cir. 1959), *cert. den.* 359 U. S. 1012 (1959)	4, 5, 11
England v. *Louisiana State Board of Medical Examiners*, 180 F. Supp. 121 (E.D. La. 1960)	4
England v. *Louisiana State Board of Medical Examiners*, 126 So. 2d 51, *reh. den.* Jan. 30, 1961, *cert. den.* Feb. 15, 1961	4
England v. *Louisiana State Board of Medical Examiners*, 194 F. Supp. 521 (E.D. La. 1961)	5

Page

Evers v. *Dwyer*, 358 U. S. 202 (1958) 13
Fallbrook Irrigation District v. *Bradley*, 164 U. S. 112, 154 (1896) 13
Goss v. *State of Illinois*, 204 F. Supp. 268 (N.D. Ill. 1962) 8, 10
Hague v. *C. I. O.*, 307 U. S. 496 (1939) 12
Harrison v. *N. A. A. C. P.*, 360 U. S. 167 (1959) 9
Hebert v. *Louisiana*, 272 U. S. 312 (1926) 10
Larson v. *S. Dakota*, 278 U. S. 429, 433 (1929) 14
Louisiana Power & Light Co. v. *Thibodaux*, 360 U. S. 25 (1959) 6
Martin v. *Hunter's Lessee*, 14 U. S. (1 Wheat.) 304 (1816) 13
Meridian v. *Southern Bell Tel. & Tel. Co.*, 358 U. S. 639, 641 (1959) 6
N. A. A. C. P. v. *Button*, 371 U. S. 415 (1963) 9, 10
Romero v. *Weakley*, 226 F. 2d 399, 401 (9th Cir. 1955) 13
Spector Motor Service, Inc. v. *O'Connor*, 340 U. S. 602 (1951) 9
Spector Motor Service, Inc. v. *McLaughlin*, 323 U.S. 101, 105 (1944) 6, 9
Tribune Review Pub. Co. v. *Thomas*, 120 F. Supp. 362 (D. Pa. 1954), Same case 153 F. Supp. 486 (D. Pa. 1957), *aff'd.* 254 F. 2d 883 (3rd Cir. 1958) 8-9
Willcox v. *Consolidated Gas Co.*, 212 U. S. 19, 40 (1909) 12, 13

CONSTITUTION AND STATUTES:

U. S. Constitution
Article III, Sec. 1 ..... 2, 11
Article III, Sec. 2 ..... 2, 8, 11
Article VI 10
Fourteenth Amendment 2, 11
28 U.S.C. § 1253 2
28 U.S.C. § 1343 ..... 2, 8, 10, 11, 12, a1, a2
28 U.S.C. § 2101(b) 2
28 U.S.C. § 2281 and 2284 3
42 U.S.C. §§ 1981 and 1983 ..... 2, 8, 12, a1
42 U.S.C. 2201 and 2202 3
Civil Rights Act of April 20, 1871, 17 Stat. 13 11

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LOUISIANA STATE BOARD OF MEDICAL EXAMINERS, ET AL.
Appellees.

Appeal From The Three-Judge United States District Court, Eastern District Of Louisiana, New Orleans Division

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BRIEF FOR THE APPELLANTS

OPINION BELOW

The reasons and judgment of the three-judge district court are printed in full in the Record, pages 127-129. The decision is reported at 194 F. Supp. 521.

JURISDICTION

The judgment of the district court was entered May 31, 1961. The Statement As To Jurisdiction was filed September 19, 1961. Probable jurisdiction was noted on February 18, 1963 (R. 147). The jurisdiction of this court rests on 28 U.S.C. §§ 1253 and 2101(b).

CONSTITUTION AND STATUTES INVOLVED

U. S. Constitution.

Article III, Section 1. Judicial Power of the United States shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.

Article III, Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made or which shall be made under their Authority; * * *.

Amendment Fourteen: No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Civil Rights Act, 42 U.S.C. §§ 1981 and 1983, and the jurisdictional authority of the district court, 28 U.S.C. § 1343, are set forth in the appendix, infra.

QUESTION PRESENTED

Where a three-judge federal district court, asked to invalidate a state statute under the United States Constitution, applies the doctrine of abstention, remitting plaintiffs to the state court while retaining jurisdiction, does the state court decision, on all state and federal issues in the case, bar consideration of federal constitutional issues by the three-judge district court, even though the federal Court of Appeals had previously held the complaint made out a prima facie case under the Fourteenth Amendment.

STATEMENT OF THE CASE

Plaintiffs, appellants herein, a large number of chiropractors, brought this action in the United States District Court for the Eastern District of Louisiana, claiming that:

(a) the Louisiana Medical Practice Act deprives them of their civil rights, privileges and immunities, without due process of law under the Constitution and laws of the United States;

(b) the Louisiana State Board of Medical Examiners administers the Act with the deliberate intention of depriving appellants of their rights, privileges and immunities under the Constitution and laws of the United States.

Appellants sought the convening of a three-judge court, praying injunctive relief under 28 U.S.C. 2281 (and 2284), invoking the federal Civil Rights Act, Rev. Stat. §§ 1977 and 1979 (1875), 42 U.S.C. §§ 2201 and 2202.

The district court, on June 20, 1957, dismissed the action on motion of defendants, holding, "Since no serious (sic) federal question, not heretofore decided by the Supreme Court of the United States is presented, in the absence of diversity of citizenship, this court is without jurisdiction" (R. 20).

On appeal, the Fifth Circuit reversed and remanded the cause September 9, 1958, for further proceedings (R. 23), holding on rehearing (R. 40) the complaint made out "a prima facie case" (R. 60). *England* v. *Louisiana State Board of Medical Examiners*, 259 F. 2d 626 (5th Cir. 1958), *reh. den.* 263 F. 2d 661, 674 (5th Cir. 1959), *cert. den.* 359 U.S. 1012 (1959).

A three-judge federal district court convened and heard argument on plaintiffs' motion for summary judgment, supported by voluminous uncontroverted affidavits, exhibits and appropriate supporting data. On January 5, 1960, that court applied the doctrine of abstention, remitting plaintiffs to the state courts to secure a current decision on the statute in question, meanwhile retaining jurisdiction of the cause. *England* v. *Louisiana State Board of Medical Examiners,* 180 F. Supp. 121 (E.D. La. 1960). (R. 116, 121)

Plaintiffs immediately sued in the state courts, and adverse decision was affirmed on appeal. *England* v. *Louisiana State Board of Medical Examiners,* 126 So. 2d 51, *reh. den.*, Jan. 30, 1961. The Supreme Court of Louisiana declined to review, stating, "The judgment of the Court of Appeal is correct". La. Supreme Court, Feb. 15, 1961, 126 So. 2d 51. (R. 124)

Appellants then moved the three-judge federal district court to vacate its order of abstention and proceed with the cause (R. 122). Defendants moved to dismiss the action on the ground that the final determination by the state courts deprived the federal court of jurisdiction (R. 126). This motion was granted by the district court on May 31, 1961, holding (R. 129), "* * * since the courts of Louisiana have passed on all issues raised, including the claims of deprivation under the Federal Constitution, this court, having no power to review those proceedings, must dismiss the complaint. The proper remedy was by appeal to the Supreme Court of the United States." *England* v. *Louisiana State Board of Medical Examiners,* 194 F. Supp. 521 (E.D. La. 1961). Such is the decision now before this Court.

ARGUMENT

I. The Trial Court Erred in Dismissing the Complaint on the Ground it Could Not Review a State Court Decision Holding Against the Federal Constitutional Rights Asserted; This Is Particularly True Since the Federal Court of Appeals Had Previously Held the Complaint Stated a Prima Facie Case.

The basic premise here is that the complaint makes out a prima facie case of constitutional rights violated by state action, under the earlier decision of the Fifth Circuit Court of Appeals.[1] The stated purpose of the abstention order (R. 116) was to see if it was really necessary to construe the federal Constitution and apply it to the state statute, a course to be avoided if possible; or would the state court, on one of the grounds suggested, render a decision which would make such a course unnecessary. (R. 119-120).

When the state court decision had been rendered, it remained for the federal court to decide the questions of federal law.

(a) Abstention is Only a Postponement of Federal Decision. Never an Evasion or Denial of Adjudication.

The district court said of its order staying proceedings (R. 120) "it would also be proper for the state to have the first opportunity to reinterpret and reapply and limit, if need be," the statute in issue. It was observed that the state court might so decide the case as to "end this controversy by a determination that chiropractors are not governed by the statute" (R. 119); or a limiting interpretation might "render

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[1] *England* v. *Louisiana State Board of Medical Examiners*, 259 F. 2d 626 (5th Cir. 1958), *reh. den.*, 263 F. 2d 661 (5th Cir. 1959), *cert. den.*, 359 U.S. 1012 (1959).

unnecessary a testing of the statute by the Constitution." (R. 120)[2] That is the only reason why the district court abstained.

Acknowledging the delay involved, the lower court said (R. 120), "one who seeks to overturn precedents must be prepared for delay and expense." Plainly the court implied that the state court action would delay, not defeat, a remedy in the federal forum.

Plaintiffs and their counsel never at any time entertained the faintest hope of relief at the hands of the state courts. Precisely that dismal prospect motivated the original resort to the federal court—lo, some six years ago.

Under the circumstances, plaintiffs showed a proper respect for the three-judge district court, and acquiesced in its purpose to secure a state court opinion on the matter before involving the federal Constitution.

Under no circumstances did this Court authorize or direct the district courts to abjure their constitutional functions by abstaining. On the contrary, the decisions cited by the lower court (R. 117) clearly pointed to the state court proceeding as a temporary detour leading back to the federal court, and not as a permanent cul-de-sac where fundamental federal rights could be lost in limbo.

In plainest language, the district court's reference to *Louisiana Power and Light Co.* v. *Thibodaux*, 360

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[2] This accords with the settled rule that the court should not "render a constitutional decision unnecessarily." *Meridian* v. *Southern Bell Tel. & Tel. Co.*, 358 U.S. 639, 641 (1959); *Spector Motor Service, Inc.* v. *McLaughlin*, 323 U.S. 101, 105 (1944).

U.S. 25 (1959), with Justice Frankfurter speaking for the Court, distinctly promised future action in the federal forum (p. 29):

> This course [remitting parties to state courts] *does not constitute abnegation of judicial duty.* On the contrary, it is a wise and productive discharge of it. *There is only the postponement of decision for its fruition.* Eventually the District Court will award compensation if the taking is sustained. If for some reason a declaratory judgment is not promptly sought from the state courts and obtained within a reasonable time, *the District Court, having retained complete control of the litigation,* will doubtless assert it to decide also the question of the meaning of the state statute. (Italics supplied)

The dilemma plaguing the court below at this time is of its own making; it has plainly misconceived its proper function to be, not a constitutional court, but a court of review to pass upon the state court's decision (R. 129). This indeed is abnegation of judicial duty! While it had retained jurisdiction of the cause, and "complete control of the litigation" (Frankfurter, J., *supra*), the district court said it was barred from sitting in review on the state court's decision; that these appellants should have taken an "appeal" (sic) to this Supreme Court from the adverse holding in the state court (R. 129).[3]

Patently, the district court's action was an exercise in futility, stripping itself of constitutional and statu-

[3] At that date, May 31, 1961, when the district court dismissed the complaint, the time for "appeal" (or certiorari) had elapsed, since the judgment of the state court was rendered February 15, 1961 (R. 124).

tory function: if the state court decision should be favorable to the plaintiffs, there would be no need for further federal court action; if it be adverse, plaintiffs would be barred from returning. So, the district court in this case annulled the Civil Rights Act, Title 42 U.S. Code §§ 1981, 1983; and abdicated its own authority under the Constitution (Article III, Section 2) and federal statute (Title 28 U.S. Code § 1343(3)).

This error is neatly highlighted by the decision in *Goss* v. *State of Illinois,* 204 F. Supp. 268 (N.D. Ill. 1962). A radio announcer was found guilty in state courts of contempt in connection with comments made over the air about a pending divorce case. After the judgment had been affirmed in the highest state court, and certiorari denied by this Court, the announcer, threatened with arrest, came into the United States district court, asserting civil rights under the Fourteenth Amendment and the statutes here involved. Directly rejecting the argument that its consideration of the constitutional rights asserted would amount to an improper "review" of the state court decision, the district court said (p. 271):

> This contention is in error. Where a constitutional question is raised out of the act of a state officer depriving or seeking to deprive a person of a constitutional right, *this Court has original jurisdiction and primary responsibility* within the historic context of the relationship of Federal Courts to the states. (Italics supplied)

After remission in *Tribune Review Pub. Co.* v. *Thomas,* 120 F. Supp. 362 (D. Pa. 1954), and the district court had no problem and continued its function in the same litigation 153 F. Supp. 486 (D. Pa. 1957), *affirmed* 254 F. 2d 883 (3rd Cir. 1958).

In *Spector Motor Service, Inc.* v. *O'Connor*, 340 U.S. 602 (1951), this court reviewed for the second time an action to invalidate a state statute. The first time it reversed and ordered remission to the state courts, while jurisdiction was retained.[4] After the state court decision, plaintiff returned to the federal district court, and in due course to this Court. Anent the federal jurisdiction to proceed after abstaining in favor of the state court, this Court expressly upheld the judicial duty (p. 605):

> The United States District Court had jurisdiction over this case in the first instance because of the uncertainty of the adequacy of a remedy in the state courts, and *it did not lose that jurisdiction* by virtue of the later clarification of the procedure in the courts of Connecticut. (Italics supplied)

The district court here cited *Harrison* v. *N.A.A.C.P.*, 360 U.S. 167 (1959), where this Court pointed out abstention involves no abdication of jurisdiction but only postponement of its exercise. Following the state court decision in that case, one of the parties plaintiff applied for certiorari to this Court, while another plaintiff returned to the district court where its case was pending at the time this Supreme Court granted certiorari. *N.A.A.C.P.* v. *Button*, 371 U.S. 415 (1963). Explaining the effect of the abstention doctrine, this Court said (p. 427):

> We meant simply that the District Court had properly retained jurisdiction, since *a party has the right to return to the District Court*, after obtaining the authoritative state court construction for which the court abstained, *for a final determination of his claim.* (Italics supplied)

In the *Button Case* this Court held there was no want of jurisdiction to review the state court decision on

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[4] Note 2, supra, *Spector Motor Service, Inc.*, v. *McLaughlin.*

certiorari, since plaintiffs showed they had elected to seek a complete and final adjudication in the state courts (p. 428) "by making no reservation to disposition of the entire case by the state courts, and *by coming here directly on certiorari.*" (Italics supplied). In a nutshell, the application for certiorari represented a waiver of the "right" so explicitly recognized in the quotation above, "to return to the District Court * * * for a final determination of his claim."

Of course, in the case at bar, no such waiver took place. By no act or deed did appellants submit the matter for final decision by the state courts; they sought only to dispose of a prerequisite to federal adjudication, to wit, an interpretation of the meaning and application of the state statute. On this subject the state court's decision is final. *N.A.A.C.P.* v. *Button, supra,* at page 432; *Hebert* v. *Louisiana,* 272 U.S. 312 (1926); *Dorchy* v. *Kansas,* 264 U.S. 286, 290 (1924); *Chas. Wolff Packing Co.* v. *Court of Ind. Relations,* 267 U.S. 552, 582 (1925).

But the judicial duty to decide questions of these federal constitutional rights has been placed on the federal courts (Title 28 U.S. Code § 1343). *Goss* v. *Illinois, supra.* While this Court granted certiorari in the *Button Case, supra,* it expressly recognized the right to return to the District Court. When these appellants sought to exercise that right, they found the door slammed shut, their federal constitutional rights completely scuttled.[5]

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[5] This would completely abrogate the U. S. Constitution as "the supreme Law of the Land" so far as the duty of a post-abstention district court is concerned. It is not considered necessary or desirable to discuss Article VI of the Constitution at this point.

This technique applies the rule of res judicata to the parties, but it thoroughly nullifies the decision of the Fifth Circuit holding the complaint states a good cause of action under the Fourteenth Amendment.[6] That decision stands unreversed. It is undeniably the law of the case, yet deliberately ignored by the district court in favor of the state court decision.

The lower court plainly misconceived both its own function as a constitutional court, and the true import of the abstention concept as a detour and not a dead-end for federal rights.

(b) Federal Court Jurisdiction in a Proper Case is Not Permissive or Discretionary, But Mandatory

It seems elementary that the district court was utterly powerless to remit the case to the state court, and thus be rid of its own responsibility. Never has the doctrine of abstention been so construed.

Chief Justice Marshall's statement in *Cohens* v. *Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821), is particularly applicable to the district courts created by Congress under Article III, section 1, of the Constitution:

> We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution.

This view follows directly from the existence of a constitutional right[7] for which there is a remedy under the Constitution[8] and federal statute.[9] The power to

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[6] *England* v. *Louisiana State Board of Medical Examiners*, note 1 *supra*.

[7] E.g. due process, equal protection, under the 14th Amendment.

[8] Article III, sections 1, 2.

[9] Title 28 U.S. Code § 1343.

redress thus entrusted to federal courts is not permissive or discretionary, but mandatory, i.e., "within the power of Congress to assign to the jurisdiction of the District Courts. Congress has exercised that power in 28 U.S.C. § 1343(3)." *Baker* v. *Carr*, 369 U.S. 186, 200-204 (1962), and cases cited. In *Willcox* v. *Consolidated Gas Co.*, 212 U.S. 19, 40 (1909), this Court gave short shrift to a suggestion that federal jurisdiction is discretionary (p. 394):

> On the contrary, there was no discretion or comity about it. When a Federal court is properly appealed to in a case over which it has by law jurisdiction, it is its duty to take such jurisdiction. * * * The right of a party to choose a Federal court where there is a choice cannot be properly denied.

This cause of action is given by Title 42 U.S. Code § 1983, Rev. Stat. sec. 1979, which was derived from the Civil Rights Act of April 20, 1871, 17 Stat. 13. The Court's jurisdiction, now Title 28 U.S. Code § 1343, was specifically defined to embrace remedies for invasion of civil rights: "such proceeding to be prosecuted in the several district or circuit courts of the United States" (17 Stat. 13). Clear is the intent of Congress that adjudication of federal civil rights is committed to the federal judiciary and not to state courts. See Stone, J., in *Hague* v. *C.I.O.*, 307 U.S. 496, 525 (1939). Completely repugnant to all concepts of our federalism is the suggestion that the lower courts may, in their discretion, decide constitutional questions, or remit them to the state courts for final decision.

On the contrary, the federal courts, high and low, must, when properly called upon, perform their con-

stitutional duties. *Evers* v. *Dwyer,* 358 U.S. 202 (1958); *Fallbrook Irrigation District* v. *Bradley,* 164 U.S. 112, 154 (1896); *Willcox* v. *Consolidated Gas Co.,* 212 U.S. 19, 40 (1909); *Romero* v. *Weakley,* 226 F. 2d 399, 401 (9th Cir. 1955); *Crown Kosher Super Market of Mass. Inc.* v. *Gallagher,* 176 F. Supp. 466, 471 (D. Mass. 1959).

At this late date it plainly would be unnecessary to re-plow the ground so thoroughly tilled in *Martin* v. *Hunter's Lessee,* 14 U.S. (1 Wheat.) 304 (1816); *Cohens* v. *Virginia,* 19 U.S. (6 Wheat.) 264 (1821); *Ableman* v. *Booth,* 62 U.S. (21 How.) 506, 514-523 (1859), and related cases bearing upon federal judicial powers. The decisions of this Court on abstention, referred to herein, passim, allow no room for stultification of federal constitutional rights by such decisions as the one here under review.[10] This Court said in so many words, in *Fallbrook Irrigation District* v. *Bradley, supra,* at page 154:

> "If the act of the state legislature as construed by its highest court conflicts with the Federal Constitution or with any valid act of Congress, it is the *duty of the Circuit Court* and of this court to so decide, and to thus enforce the provisions of the Federal constitution." (Italics supplied)

No other evaluation of the federal-state relationship can possibly preserve the operating vitality of the federal Constitution. This vitality depends completely upon its interpretation by federal courts independ-

[10] The court below said, in dismissing this case (R. 128), "since, in the usual case, no question not already passed on by the state courts will remain, he (plaintiff) is thereby effectively deprived of a federal forum for the adjudication of his federal claims."

ently of any state court decision. See Taft, C.J., in *Larson* v. *So. Dakota*, 278 U.S. 429, 433 (1929).

The authorities cited by the district court as ground for dismissal offer no precedent for such a result; they indicate only a misapprehension of this Court's views on the occasion and purpose of abstaining.

CONCLUSION

The district court erred in dismissing the complaint, thereby refusing to perform its judicial duty as required by the Constitution of the United States and federal statute. It wholly misconceived the doctrine of abstention as a bar to, rather than a postponment of, federal adjudication.

It is submitted the judgment below should be reversed with directions to afford the parties a hearing, and proceed to independent judgment on the constitutional issues.

Respectfully submitted,

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APPENDIX

Civil Rights Act, Title 42 U. S. Code

§ 1981. Equal rights under the law

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other. R.S. § 1977.

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. R.S. § 1979.

Title 28, U. S. Code

§ 1343. Civil rights and elective franchise

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

• • •

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote. June 25, 1948, c. 646, 62 Stat. 932; Sept. 3, 1954, c. 1263, § 42, 68 Stat. 1241; Sept. 9, 1957, Pub.L. 85-315, Part III, § 121, 71 Stat. 637.